

**REPUBLIC v. BETRAM MAPUNDA AND OPTATUS  
TEMBO**

HIGH COURT OF TANZANIA  
AT MTWARA  
(Msumi, J.)

**CRIMINAL SESSIONS CASE No. 47 OF 1982**

*Criminal Law – Murder – Malice aforethought – Factors to be considered in establishing malice aforethought – Nature of the wound inflicted on the deceased – Whether a relevant factor.*

*Evidence – Circumstantial evidence – Whether circumstantial evidence alone can sustain a conviction for murder.*

The two accused persons were jointly charged with the murder of the wife of the first accused. The deceased had died from excessive external and internal bleeding caused by a wound inflicted on her neck. The two accused were the only persons who had been with the deceased on the fateful day. The second accused was a visitor living with the couple, although for part of the day in question he was not with the couple; he had gone to visit a friend about two miles away. The prosecution relied on circumstantial evidence to prove the offence. During the trial, the first accused claimed that he was attracted by a cry of his child from the house and when he entered the house he found his wife dead, and he concluded that she had committed suicide. The prosecution disputed this claim as there was no sign of struggle and the wound on the neck of the deceased was too big for the deceased to have inflicted it upon herself. And there was no pool of blood on the bed she was found lying after death. Four pairs of blood stained trousers were dug from the ground and the blood was tested and it matched that of the deceased.

**Held:** (i) The circumstantial evidence available in this case irresistibly leads to the conclusion that the first accused killed the deceased with malice aforethought;

(ii) The nature of the wound shows that the first accused, who inflicted it upon the deceased, intended to kill and the charge of murder against him therefore is proved beyond reasonable doubt;

- A (iii) There is a reasonable doubt as to the guilt of the second accused person; he is, therefore, found not guilty.

Case referred to:

- B (1) *Samson Daniel v. R* (1934) EACA 134  
*Mr Sengwaji* State Attorney, for the Republic  
*Mr Mkongwa* Advocate, for the accused

C **JUDGMENT**

(Delivered 31 October 1984)

- D **MSUMI, J.:** The two accused persons are jointly charged with the murder of one Evalina d/o Nchimbi. They are alleged to have committed this offence on or about the 26 June 1981 at Mpapa Village within the District of Mbinga. Both accused pleaded not guilty.

- E There is no dispute that one Evalina d/o Nchimbi who was the wife of the first accused is dead and that she died on 26 June 1981 at Mpapa Village. Besides being not contentious, this fact has been proved by the brother and father of the deceased who testified as  
 F PW5 and PW6 respectively. Both witnesses told the court that they identified the dead body of the deceased to Dr. Heri (PW 7) who performed post-mortem examination on it. After the said examination, they took the body to their home village for burial. On the other  
 G hand, Dr. Heri certified before this court and in his report that the said Evalina d/o Nchimbi is in fact dead. Thus acting on this evidence I take it as proved beyond reasonable doubt that Evalina d/o Nchimbi is dead. The question which follows now is how the deceased met  
 H her death.

- I Happily, this issue is not also in dispute. All the witnesses, viz: Dt. Cpl. Saidi (PW1), Beatus Kowelo (PW2), Ludgeri Fuluko (PW5), Damian Makopa Nchimbi (PW6) and Dr. Heri (PW7) who viewed the body of the deceased on different occasions observed a large cut wound on the neck. Dr. Heri deposed that the said wound cut the

skin, trachea, esophagus, left and right common carotid arteries, left and right jugular veins, and left and right sterno-mastoid muscles. The said wound measured 7 cm deep and 17 cm long. In fact, the deceased's head was almost severed from the rest of the body. The doctor concluded his report by expressing his opinion to the effect that the deceased died from excessive external and internal bleeding caused by the said cut wound. I take it as proved therefore that the deceased's death was not a natural one. To be more precise she was in fact slaughtered.

It is obvious that whoever killed the deceased was not legally justified to do so. I can think of no situation whereby one is authorized by the law to slaughter one's fellow human being. In any case there has been no suggestion, throughout the trial of this case, that the deceased was lawfully killed. Hence I find it safe to hold thus: the deceased was unlawfully killed.

As in most homicide cases, the most contentious issue in this case is whether the two accused persons are the ones who killed the deceased. In this connection the learned State Attorney conceded both in his opening and final speeches that he had no witness who saw the accused persons or either of them killing the deceased. The prosecution case wholly hinges on circumstantial evidence. But this is far from saying that the prosecution case is weak. That circumstantial evidence is sometimes the best evidence is a time-honoured legal pronouncement. Thus in *Samson Daniel v. R* (1) the then Court of Appeal for Eastern Africa observed:

... circumstantial evidence may be not only as conclusive as, but even more conclusive than, the evidence of an eye-witness.

However, in the same judgment the court sounded a warning when it said:

... the circumstantial evidence must lead to the inevitable conclusion that the death was the act or contrivance of the accused. If there is an alternative which can with any reasonable probability account for the death, this excluded the certainty which is required to justify a verdict of guilty.

A Thus the question in the present case is whether the circumstantial evidence on which the prosecution side relies does irresistibly lead to establishing the guilt of the accused person. This question can only be answered after laying bare the alleged circumstantial evidence on which the case for the prosecution is built.

B First, it has been undisputably established that the two accused were the only persons who were with the deceased on the fateful day and at the material time. Up to the day of incident, the first accused and deceased were living together as husband and wife. Besides the couple, the family consisted of a small child about 3 years old and a newly-born baby. However, on 23 June 1981 the second accused visited the couple and lived with them up to the day of the incident.

C But in fairness to the second accused person, it has been established that on that day, from 12:30am to about 2:00pm when the first accused allegedly found out that his wife was dead, he was not with the couple. It is in evidence that at that time second accused had gone to visit one Severin who was living about two miles away. Be it as it may, the most important thing is that the two accused were the only persons who had the opportunity of killing the deceased. In his defence the first accused admitted that he was with the deceased throughout that day and that besides the second accused, nobody else visited them.

D The accused further asserted that if any other person had come there he would necessarily have seen him.

E First accused's reaction soon after he had allegedly "discovered" the body of the deceased is gravely incriminating to him. In his own words the accused told the court that he went late into their bedroom after being attracted by the cries of his child. It was then he found the deceased dead, lying in her bed. But the accused said that he did not view the body closely; he noticed her dead while standing at a distance of about five paces from the bed in which the body was lying. To say the least, this is quite unusual more so to a husband who has suddenly discovered that his dear wife is dead.

F But it is even more startling when the first accused hastily came to the conclusion that the deceased had committed suicide. First

A the accused told the court that he found the body with a cut wound on the neck and a knife lying on one side. In the normal circumstances one would have expected the first accused to suspect that his wife had been killed. It would have been different if the deceased was found hanging on a rope. In other words, *prima facie* the first accused person had no reason to believe, let alone suspect, that his wife had committed suicide.

C There is yet another piece of circumstantial evidence which makes the first accused's claim that the deceased slaughtered herself, fictitious. According to the evidence of the witnesses who saw the body of the deceased still lying in her bed, it is evident that the body appeared peaceful. There were no signs of agony which usually accompany the moment when a person dies of suicide. For example one would have expected to find the deceased body in a state of disorder showing as if there was a struggle. It is even more strange to note that the deceased's body was quite orderly covered with a blanket. The deceased could not have slaughtered herself while calmly lying underneath the blanket.

F Furthermore the first accused's claim that the deceased slaughtered herself is rendered even more unreal when you consider the gravity of the cut which led to her death. According to the doctor's report the said wound measured 17 cm long by 7 cm deep. As a result, the following tissues and/or ligaments were completely cut: viz, the skin, trachea, esophagus, left and right common-carotid arteries, left and right jugular veins and left and right sterno-mastoid muscles. Such grave wound could not have been self-inflicted. In order to accomplish it the victim was required to apply great force which she could not consistently maintain.

H According to the first accused's claim, the deceased committed suicide while she was in her room in the bed. If this is so then one would have expected to find a pool of blood in the said room, particularly in the bed. On the contrary, the evidence of PW1 and PW2 established that only a few drops of blood were found underneath the bed. The doctor testified that the deceased bled excessively and hence the

A cause of her death. Where was this blood? Deceased could not have slaughtered herself outside the house and then walk into the room! As a whole I am convinced that the first accused's claim that the deceased committed suicide is a hoax. The truth is that she was killed  
B somewhere and her remains were carried into the room.

There is additional circumstantial evidence which gravely incriminates the first accused to this killing. In the course of his investigation, PW1 managed to dig out from the ground, among other things, four  
C pairs of long trouser's belonging to the first accused person. All the trouser's were stained with blood. One of the trousers together with the accused's blood sample and the blood stained knife which was found near the body of the deceased, were sent to Government  
D Chemist for observation. Consequently, it was certified that the stains found on the trousers and the knife were of a human being belonging to group AB. On the other hand the blood samples of the two accused persons were analysed and found to belong to group A and O respectively.  
E In his defence the first accused not only admitted that all the four trousers were his, but he also confirmed that the blood stains which were on them were that of the deceased.

The explanation given by the accused on the presence of the deceased's  
F blood stains in his four trousers does not raise any doubt, let alone reasonable doubt, as to his active involvement in the killing of the deceased. Briefly he claimed that those clothes were in the bed underneath the mat on which deceased's body was found lying. This claim is  
G rendered fanciful by the evidence of PW1 who testified that except for the stained knife, he did not find any other blood stained item in the room, let alone in the bed in question.

In his final submission the learned defence counsel argued that  
H if the finding of deceased's blood stains on the four trousers of the first accused is to be held incriminating to his client, then it must be held that all these trousers were worn by the first accused when he was killing the deceased. With respect, it is not necessary to  
I make such a finding; and in fact at no time has the prosecution invited the court to such view. As the learned defence counsel quite rightly

pointed, it was not possible for the first accused to wear all these  
A four trousers at one time. But for the sake of argument even if he did, not all the four trousers would have been so stained. At least the inner most one would have been clean. The most sensible view I  
B hold on this question is that these four trousers were used to rub off the deceased blood after she was killed. This sounds sensible because besides the four trousers there were also recovered from the hole four underpants two of which the first accused identified  
C to be his and the other two to be those of his late wife. Now if the learned defence counsel's explanation is to make any sense it means that at the time when she was killed the deceased was wearing those two underpants!

All in all I am convinced that the circumstantial evidence we  
D have in this case is such that it irresistibly leads to the conclusion that the first accused was gravely involved in the killing of the deceased. However, I cannot, without discomfort, make similar finding against the second accused person. The only piece of evidence which connects  
E him to this case is the fact that he was at the house of the first accused on the fateful day. But it has not been established the exact time of the day when the deceased was killed. This is important because there is strong evidence that between 12:30am and about 2:00 pm  
F the second accused was away from the house. He went to see one Severin at a village called Arusha which is about two miles away. What guarantee do we have to hold that the deceased was not killed at the time when the second accused was away to Arusha village?  
G Absolutely none. It is quite possible, in fact probable, that the deceased was killed at the time when the second accused was at the house of Severin.

Admittedly, there is a strong suspicion that the second accused  
H might have been involved in the killing of the deceased. But fortunately it is not part of the law of this country that an accused person may be convicted on suspicion, grave though it may be. To warrant conviction the prosecution must prove beyond reasonable doubt that the accused  
I is guilty. Anything short of this is not good enough.

A And lastly there is the question of malice aforethought. With  
 respect, I totally adopt the reasoning of the learned State Attorney.  
 In short he argued that from the nature of the wound it is clear that  
 B the person who inflicted it intended to slaughter the deceased. And  
 invariably, he slaughtered in order to kill. Thus in this case it is  
 clear that whoever slaughtered the deceased, he did so with a clear  
 intention of killing her. As I said, I totally agree with this reasoning.  
 C Hence in the present case I find it as proved that when the first accused  
 killed the deceased, he did so with malice aforethought.

From what I have said so far I am of the opinion that the charge  
 of murder against the first accused person has been proved beyond  
 reasonable doubt. I accordingly find him guilty and convict him as  
 D charged. On the other hand there is reasonable doubt as to the guilt  
 of the second accused person. In compliance with the law, I am resolving  
 this doubt in favour of him. The second accused is therefore acquitted.

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## REPUBLIC v. ISMAIL NAPOSE

F

HIGH COURT OF TANZANIA  
 AT MTWARA  
 (Msumi, J.)

G

### CRIMINAL SESSIONS CASE No. 34 OF 1982

H *Criminal Law – Murder – Defence of Provocation – Acts that may constitute  
 provocation – Whether wife's refusal to have sexual intercourse is an act  
 constituting provocation.*

I *Provocation – Evidence – Burden of proof when provocation is pleaded as a  
 defence to a charge of murder – Burden on the prosecution to show absence  
 of provocation.*

A The accused was charged with the murder of his wife. In his sworn testimony before  
 the court he admitted that he killed the deceased by cutting her with an axe, which  
 was exhibited in court. The accused, however raised the defence of provocation  
 claiming that the deceased had refused him sexual intercourse, in addition to a number  
 of annoying acts, namely: her refusal to accompany him home at night from a *ngoma* B  
 ceremony, her delay in coming back home that same night, and her decision and act  
 of going back to the *ngoma* the next day without the permission of the accused. The  
 main issues before the court were whether the refusal of sexual intercourse was  
 legally provocative and whether the accused was still in the heat of passion when he C  
 inflicted the fatal wound on the deceased.

**Held:** (i) Refusal of sexual intercourse *per se* does not constitute provocation; it may  
 constitute provocation if it is coupled with other circumstances;

(ii) The acts of the deceased of refusing to accompany her husband home from D  
 a local *ngoma* ceremony and staying there until morning, and of subsequently going  
 back to the *ngoma* without her husband's consent were not so grave as to constitute  
 provocation;

(iii) The conduct of the accused was not consistent with that of a man acting in E  
 the heat of passion, as the accused was in a controlled and sober state of mind when  
 he decided to cut the deceased with the axe; the plea of provocation is therefore  
 dismissed;

(iv) The burden of proof of provocation is not on the accused person but, whenever F  
 provocation is raised as a defence or facts suggest its presence, it is for the prosecution  
 to prove the absence of such possibility.

***The accused is found guilty of murder*** G

Case referred to:

(1) *Rex v. Saidi s/o Nakandu*, (1948) E.A.C.A. 110

Mr Kumwembe for the Accused H

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